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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO. _____

JOSEPH B. BERGEN,
Petitioner,

VS.

B. AVANT EDENFIELD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELVENTH CIRCUIT

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PRELIMINARY MATTER

QUESTIONS PRESENTED FOR REVIEW

1. The main question of federal law of exceptional importance in this case that constitutes a special and important reason for the Supreme Court to exercise its judicial discretion of review on certiorari that a federal court of appeals has decided which has not been, but should be settled by this court is the constitutional right of an individual who had been appointed an Art. III federal district judge to return to the bench and assume his former role as a sitting judge after having voluntarily ceased all judicial functions for an extended period of time without having first obtained any authorization to step down from the bench and to receive compensation during the time he ceased his judicial function, where Title 28 USC Secs. 144 and 455(a), the judicial disqualification statutes, provide for recusal only on a case by case basis.

2. Another important question of federal law, which has not been, but should be, settled by this court, is whether an active member of the bar with cases pending before the court where that judge ceased to perform his judicial duties can challenge the attempt of that individual to thereafter resume his judicial duties under the above circumstances.

3. The final question of exceptional importance that calls for an exercise of this court's power of supervision is the rendering of a decision by a federal court of appeals involving a federal question that has far departed from the accepted and usual course of judicial proceedings by improperly injecting sua sponte the question of the petitioner having been found in criminal contempt by the respondent to which the panel decision of the Circuit Court made independent reference.

INTRODUCTORY MATTER

LIST OF ALL PARTIES

A list of all parties to the proceeding in the court whose judgment is sought to be reviewed is as follows:

Joseph B. Bergen, Petitioner

B. Avant Edenfield, Respondent

William French Smith,
Attorney General with the United States

Rex E. Lee,
Solicitor General with the United States

Barbara L. Herwig and Frederick Geilfuss,
Attorneys, Appellate Staff,
Civil Division, Department of Justice

Hinton Pierce, United States Attorney
Southern District of Georgia

Edward S. Szukelewizz
Attorney for Respondent.

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TABLE OF AUTHORITIES

Cases:

Public Citizens, Inc., v. Simon, 239 F.2d.211, 216-219 (D.C.Cir. 1976) 11

Stephen S. Chandler, United States Dist. Judge for the Western Dist. of Oklahoma, Petitioner, v. Judicial Council of the Tenth Circuit of the United States, 398 U.S.74, 28 L.Ed. 2d.100, 90 S.Ct.1648, reh. den. 399 U.S. U.S.937, 26 L.Ed.2d.809, 90 S.Ct. 2248 16

Taylor v. U. S., 591 F.2d.688 13

Uniform Sanitation Mens Assn. v. Commission of Sanitation of City of New York, 446 F.2d.619 12

United States v. Powell, 330 U.S. 238. 23

United States v. Standard Oil Co., 332 U.S.301,302 n.2 23

Code Sections:

28 USC Sec.372(c)(6)(B)
28 USC Sec.134(a)28
28 USC Sec.144 & 455

United States Constitution:

Art. II, Sec. 4
Art. III, Sec. 1

PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court for the Southern District of Georgia (Appendix Exhibit A) is unreported. The opinion of the Court of Appeals for the Eleventh Circuit (Appendix Exhibit B) is not published as yet.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eleventh Circuit was made and entered on March 28, 1983. A copy of said judgment is appended to this petition in the appendix.

The order of the Court of Appeals for the Eleventh Circuit denying rehearing was made and entered on June 3, 1983. A copy of that order denying rehearing also is appended to this petition in the appendix. (Appendix Exhibit C).

The statutory provision conferring on this court jurisdiction to review the

above judgment by writ of certiorari is invoked under Title 28 USC Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution Article II, Sec.4:

Section 4. Removal from office.

U. S. Constitution Article III, Sec.1:

Section 1. Supreme Court and inferior courts--Judges and compensation.

Title 28 USC Sec. 372(c)(6)(B):

Judicial Discipline.

Title 28 USC Sec. 134(a):

Section 134. Tenure and residence of district judges.

Title 28 USC Sec. 144:

Bias or Prejudice of Judge.

Title 28 USC Sec. 455:

Disqualification of Judge.

STATEMENT OF THE CASE AND BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The respondent, on November 9, 1978, became a United States District Judge for the Southern District of Georgia in which the petitioner, a practicing attorney since February 12, 1951, is actively engaged in trial practice and where the petitioner has pending cases on the active docket in that court.

The respondent continuously sat as the United States District Judge from the date he assumed that office until December 8, 1981, when the respondent announced he was removing himself from all official court duties because his name had appeared in a United States Justice Department probe and a United States Grand Jury investigation. Respondent, along with members of his law firm, and others, became a target of that criminal investigation.

Following the indictment of another member of respondent's former law firm, as well as other parties, the respondent on June 16, 1982, announced that he intended to resume sitting as a United States Judge on June 24, 1982, and that he would preside at trials scheduled in the Savannah Division of the Southern District of Georgia on June 28, 1982.

During the period from December 8, 1981, to June 24, 1982, respondent received full compensation from the United States Treasury for services as a United States District Judge that he did not perform.

The respondent voluntarily withdrew from all of his judicial duties rather than requesting a hearing before the Judicial Council of the Eleventh Circuit of the United States that was empowered to suspend appellee from his duties as a United States District Judge.

The petitioner, on June 21, 1982, filed in United States District Court for the Southern District of Georgia an action seeking the Writs of Quo Warranto and Prohibition, Declaratory Judgment and Injunctive Relief with an alternative application for convening of the Judicial Counsel of the Eleventh Circuit of the United States, claiming that as a result of the respondent removing himself from all official court duties as a United States District Judge on November 9, 1981, because he was a target of a United States Department of Justice probe and a United States Grand Jury investigation and had not performed any judicial duties for a period of six months until June 16, 1982, when the respondent announced he intended to resume sitting as a United States District Judge on June 24, 1982, the petitioner was entitled to a judgment declaring whether the respondent had

forfeited his office as a United States District Judge by abdicating his commission and withdrawal from all of his judicial duties, and declaring that the monies received by respondent as a salary during this period should be returned to the United States Treasury.

The petitioner also sought injunctive relief to prevent the respondent from accepting any further compensation from the Treasury and to prevent the respondent's attempt to resume his office as a United States District Judge. The petitioner in the alternative made application for the convening of the Judicial Counsel of the Eleventh Circuit of the United States and for the Writs of Quo Warranto and Prohibition to be issued by this Judicial Council to grant the relief sought by petitioner in his complaint against respondent.

The Chief Judge of the United States District Court for the Southern District of Georgia, The Honorable Anthony A. Alaimo, on June 25, 1982, entered an order, sua sponte dismissing the complaint of petitioner on the basis that the allegations of the complaint were both frivolous and malicious, without deciding that petitioner had standing to bring the action although indicating by footnote that the court was of the opinion that current jurisprudence would mandate dismissal for lack of standing and the failure to show any actual or concrete injury beyond a generalized grievance. This order then specifically declined the request of petitioner that the Chief Judge of the United States District Court for the Southern District of Georgia notify the Chief Judge of the United States Court of Appeals for the Eleventh Circuit of his alternative application for convening the

Judicial Council of the Eleventh Circuit of the United States and for the Writs of Quo Warranto and Prohibition.

On appeal the United States Court of Appeals for the Eleventh Circuit in a per curiam opinion, the panel consisting of Circuit Judges Rooney, Vance and Anderson, held: 1) that petitioner did not have standing either as a taxpayer or as an attorney to claim that the actions of a federal district judge deprived him of the right to receive compensation under an unchallenged enactment of Congress or to have a declaration that a federal district judge had forfeited his office. (Divisions 1, 2, and 3). This opinion also held: 2) that even if petitioner had standing there is no law providing a basis for such a suit under USCA Const. Art. 2 Sec. 4; Art. 3 Sec. 1; 28 USCA Section 372(c)(6)(B). (Division 4). This opinion finally held: 3) that any complaints

against a federal judge are the concern of the judicial council and cannot be initiated in either a district court or a court of appeals. 28 USCA Sec. 372(c); U.S. Ct. App. 11th Cir. Addendum 3, 28 USCA. (Division 5).

The basis for federal jurisdiction in the court of first instance is the inherent power of a federal district judge to control proceedings in a district court which would include the power to exclude a usurper from sitting on a federal district court bench.

ARGUMENT

The premise of the per curiam panel decision of this Court of Appeals handed down on March 28, 1983, is that there is no law providing a basis for the suit filed by petitioner (citing: USCA Const.Art.2 Sec. 4; Art.3 Sec. 1; 28 USCA Sec. 372(c)(6)(B)), and that, in any event, the petitioner did not have

standing either as a taxpayer or as an attorney to seek a declaration that a federal district judge had forfeited his office and an order requiring him to return compensation.

The panel decision then concluded that the only remedy available on a complaint against a federal judge is from the judicial council and not in the district court or the court of appeals. Citing: 28 USCA Sec.372(c); U.S. Ct. of Appls. 11th Cir. Addendum 3, 28 USCA. The sua sponte opinion of the district court dismissing petitioner's complaint and the per curiam opinion of the Eleventh Circuit Court of Appeals addresses one issue, whereas the issue proffered by the petitioner in both his complaint and his appeal from the order dismissing that complaint is an entirely different one. The district court and the appellate court deal with the right of "removal" of a

"sitting judge." This petitioner, on the other hand, seeks to have declared that the respondent since December 8, 1981, ceased being a judge and that when he attempted to return to the bench - which he has subsequently done - the respondent became an interloper without authority to perform the judicial duties of a sitting federal district judge. The two propositions are entirely different.

The only decision cited by the panel involving a factual situation that comes anywhere close to the facts of the present case is Public Citizens, Inc. v. Simon, 159 F.2d.211, 216-19 (D.C.Cir.1976), denying a taxpayer's standing to challenge the payment of federal salaries to White House aides while they devoted virtually all their time to the re-election campaign, not their official duties. In the Simon case the White House aides did not announce they were quitting their

official duties and then after a six months period attempt to return to these duties, as was done in the present case. These staff members continued to work as such at the White House during the challenged period. Not so with the respondent, who ceased all judicial duties.

This being the case, certainly a member of the Bar having cases pending before the court where the respondent announced he was returning would have a right to have determined whether the respondent had authority on his own to once again sit as a federal district judge. An officer who neglects his official duty automatically loses his right to office and becomes a mere interloper (67 CJS Sec.101) even though, as in this case, the respondent may have stepped down from his judicial duties under pressure. Uniform Sanitation Men's

Ass'n. v. Commission of Sanitation of City of New York, 446 F.2d.619, motion den. 91 S.Ct.2223, 403 U.S. 919, 29 L.Ed.2d. 693, cert.den. 92 S.Ct.2055, 406 U.S.961, 3 L.Ed.2d.349. This voluntary termination on the part of the respondent may not be revoked or withdrawn at his option. Taylor v. U.S., 591 F.2d.688. In Taylor the court held that the fact a federal employee is faced with an unpleasant situation, or has to choose between two unpleasant alternatives, does not make his resulting action involuntary unless there is deception, coercion, duress, time pressure or intimidation.

Furthermore, the general principle governing public employees and officers is that public employees and officers do not have the absolute constitutional right to refuse to account for their official actions and still keep their jobs, which means that public officers do not have the

right not to perform their work and still keep their jobs. See: Uniform Sanitation Men's Ass'n., Id.

The appointment of respondent as a United States District Judge required under U.S. Const. Art. 3 Sec.1 and the provisions of Public Law 92-208, Sec.3,(3)(e), 85 Stat.742, as codified in Title 28 USC Sec. 134(a), that the respondent would continuously hold his office during good behavior, and the Constitution and this statute contemplate that a district judge shall, while holding such office, continually perform his duties unless disqualified as provided by law or suspended in a manner provided by the rules of a judicial council.

The provisions of law providing a salary to each judge of a district court of the United States contemplates that the value of the compensation shall not be diminished while a judge "continues" in

office. U.S. Const., Art.3, Sec.1, codified in Title 28 USC Sec. 135, contemplates that a judge receiving this authorized salary would perform his judicial duties unless disqualified or suspended.

Title 28 USC Sec. 144 and 455, the first authorizing a party to seek judicial disqualification and the latter requiring disqualification, concern disqualification in a particular proceeding, not stepping down indefinitely from all judicial functions. Petitioner, furthermore, does not seek to "remove" the appellee, as removal is indeed limited to the impeachment process provided under U. S. Const. Art. 2, Sec. 4. Also, the thrust of petitioner's action was not to file a complaint with the judicial council to "discipline" a judge under the provisions of 28 USC Sec.372(c); U.S. Ct. App. 11th Cir. Addendum 3, 28 USCA, but rather to

have a person who is sitting as a judge declared not to be a judge under the authority implied in Stephen S. Chandler, U.S. District Judge for the Western District of Oklahoma, Petitioner, v. Judicial Council of the Tenth Circuit of the United States, 398 U.S.74, 28 L.Ed.2d.100, 90 S.Ct.1648, reh.den.399 U.S.937, 26 L.Ed.2d.809, 90 S.Ct.2248, that held: "...if a judge in any system refuses to abide by...reasonable procedures [such as the procedure that allows a due process hearing to determine whether such judge should be suspended as provided in paragraph 5(b) Addendum 3 of the Rules for Conduct of Complaint Proceedings] it can hardly be that the extraordinary machinery of impeachment is the only recourse."(h2).

Again, the point is whether the person sitting as a judge is, in fact, a judge. The only way a sitting judge who

desires to be relieved of his duties for an extended period of time or who is concerned about whether he should sit in all cases, can be relieved without vacating his office is to invoke the process of the judicial council to and have a due process hearing for a determination as to whether he should continue to sit or be suspended. There is no other mechanism by which a judge can quit all of his judicial duties without quitting his office.

The panel decision also alludes to a criminal contempt order issued by respondent against petitioner brought to the attention of this court by respondent in an appendix to his brief that was without question an unrelated proceeding. This reference was purportedly made to show petitioner's motive for filing his complaint. The petitioner moved the Court of Appeals to strike this appendix and the

reference to this contempt proceeding as not being relevant to the present action. This motion was denied and the panel decision then went further and volunteered that the outcome of the present lawsuit then on appeal could not affect the validity of the contempt citation since the order holding the petitioner in contempt preceded the date of the filing of petitioner's action against the respondent.

The petitioner has never made this contention and suggests once again that the injection of this so-called contempt action in this lawsuit is improper. The contempt action was referred to The Honorable Robert Elliott, United States District Judge, Middle District of Georgia, by Chief Judge Anthony A. Alaimo for "plenary disposition" on October 29, 1981, - where the matter is still pending, if in fact it remains

pending at all - after the respondent was disqualified from any further proceedings in that contempt action following the filing of an Affidavit of Bias and Prejudice that set forth with particularity various specific acts of bias and prejudice demonstrated against the petitioner by the respondent prior to and during the contempt proceeding which were confirmed by affidavits attached as an appendix to appellant's Reply Brief in the Court of Appeals only after the appellate court denied petitioner's Motion to Strike and Remove from the appendix the order filed by respondent. These affidavits that confirmed this bias and prejudice by acts of the respondent subsequent to the contempt proceeding are attached to this brief as Appendix D.

Notwithstanding the promises of respondent set forth in the above affidavits dated January 11, 1982, the

corrective action promised by respondent relating to this contempt finding has not taken place.

Petitioner suggests that this reference to the criminal contempt proceeding brought against him by the respondent in a prior, unrelated proceeding unfairly impugned his professional integrity that will be memoralized in the Federal Reporter System and he is entitled to have this court correct this statement which does not express the status of that proceeding in which the respondent was disqualified on an Affidavit of Bias and Prejudice with that proceeding having been referred to another judge for plenary disposition some 20 months ago, where that referring judge has apparently elected to take no action on the matter that was sent to him for independent full and complete action. As Francis Bacon stated in his Will: "I

bequeath my soul to God....My body to be buried obscurely. For my name and memory, I leave it to man's charitable speeches, ..." Edgar Allen Poe said: "It is with literature as with law or empire - an established name is an estate and tenure, or a throne in possession." This matter should be set straight.

This opinion of the Court of Appeals in which the court gratuitously referred to criminal contempt action against the petitioner by the respondent would seem to be a shocking wrong and clearly presents a due process question since what has been stated by the court in this opinion is so totally devoid of evidentiary support as to render the improper reference to this conviction that is not final in the trial court unconstitutional under the due process clause of the Fourteenth Amendment.

Thus, the questions presented by this case are of great and recurring significance, in that this court judicially knows that a number of federal district judges in other districts during the pendency of this very action also have stepped down from the bench and ceased performing their judicial duties while under criminal investigation or while being criminally prosecuted.

The serious questions of imperative public concern and extraordinary national importance will be affected by the decision below, if unreversed, making this case a peculiarly appropriate one for the exercise of this court's discretionary jurisdiction to prevent a serious hindrance of the administration of justice.

The lower court's decision, affirmed by the United States Court of Appeals for the Eleventh Circuit interpreting the

constitutional provisions controlling the appointment of federal district judges and the statutory provisions controlling disqualification of federal district judges are so inconsistent in theory as to leave the intention and meaning of these constitutional provisions and statutes in a state of confusion thereby causing a troublesome issue in numerous cases making desirable an early and definitive ruling by the Supreme Court. United States v. Standard Oil Co., 332 U.S.301,302 n.2; United States v. Powell, 330 U.S.238.

It is suggested that the Supreme Court has the prime responsibility for the proper functioning of the federal judiciary.

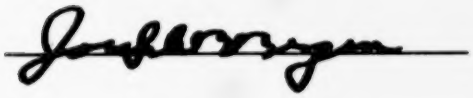
CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should

be granted to review the judgment and opinion of the Eleventh Circuit upholding the judgment and opinion of the District Court dismissing the complaint of petitioner in the trial court.

Respectfully submitted,

JOSEPH B. BERGEN, PRO SE



APPENDIX

(A) Copy of opinion delivered upon rendering of the judgment by the district court whose decision is sought to be reviewed.

(B) Copy of opinion of United States Court of Appeals for the Eleventh Circuit.

(C) Copy of order on rehearing issued by the United States Court of Appeals for the Eleventh Circuit.

(D) Copy of Affidavits.

(E) Text of Constitutional Provisions and Statutes Involved.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JOSEPH B. BERGEN,	]	
	]	
Petitioner,	]	
	]	CIVIL ACTION
v.	]	
	]	NO. CV 482-247
B. AVANT EDENFIELD,	]	
	]	
Respondent.	]	

O R D E R

Pursuant to this Court's practice that copies of all pleadings filed with the clerk are promptly transmitted to the undersigned, the foregoing complaint has come to the attention of this Court before the filing of any responsive pleadings.

Upon a careful and painstaking examination of the complaint, and assuming, without deciding, that plaintiff

has standing to bring this action,[1] the Court, unable to discern a justiciable controversy or cause of action, is convinced beyond doubt that the allegations of the complaint are both frivolous and malicious, and that the complaint should therefore be dismissed without more.

The Court respectfully declines petitioner's invitation to act as his messenger in filing the complaint with the Clerk of the Eleventh Circuit Court of

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[1]This Court is of the opinion that current jurisprudence would mandate dismissal for lack of standing, and the failure to show any actual or concrete injury beyond a generalized grievance. See Valley Forge Christian College v. Americans United for Separation of Church and State, ___U.S.___, 70 L.Ed. 2d.700 (1982); Schlesinger v. Reservists Committee to Stop the War, 418 U.S.208 (1974); United States v. Richardson, 418 U.S.166 (1974); Flast v. Cohen, 392 U.S.83 (1968); Public Citizen Inc. v. Simon, 539 F.2d.211 (D.C. Cir.1976); Longendorf v. Administrators of the Tulane Educational Fund, 528 F.2d 1076 (5th Cir.1976).

Appeals. This Court's Rules provide otherwise.

Accordingly, the clerk is directed to enter a judgment dismissing the action.

So Ordered, this 25th day of June, 1982.

/s/ Anthony A. Alaimo
Chief Judge, United States District Court Southern District of Georgia.

APPENDIX B

JOSEPH B. BERGEN, Plaintiff-Appellant,

v.

B. AVANT EDENFIELD,

Defendant-Appellee.

No. 82-8396

Non-Argument Calendar.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT.

March 28, 1983.

Suit was brought against federal district judge seeking declaration that judge had forfeited his office and order requiring judge to return all compensation received from the Federal Government since the date when he allegedly vacated his office. The United States District Court for the Southern Distract of Georgia, Anthony A. Alaimo, Chief, Judge, sua sponte dismissed the action, and plaintiff appealed. The Court ot Appeals held that: (1) plaintiff lacked standing either as

taxpayer or as a member of the bar of the court on which defendant judge sat to maintain the action; (2) in any event, there was no law providing a legal basis for the suit; and (3) proceedings on complaint against judge are the concern of the judicial council and cannot be initiated in either district or circuit court.

Affirmed.

1. UNITED STATES - 91-3/4

To obtain standing as a taxpayer, plaintiff must complain about an action taken by Congress pursuant to its taxing and spending authority and must demonstrate a specific constitutional limitation upon that authority which Congress has exceeded.

2. UNITED STATES - 91-3/4.

Plaintiff did not have standing as a taxpayer to maintain action claiming that actions of federal district judge deprived him of right to receive compensation under an unchallenged enactment of Congress appropriating funds to pay salaries.

3. DECLARATORY JUDGMENT - 300.

Plaintiff did not have standing as an attorney admitted to practice before the court on which defendant judge sat to maintain action seeking declaration that federal district judge had forfeited his office, and seeking order re quiring him to return compensation received from the Federal Government.

4. JUDGES - 7,22(1).

Even if plaintiff had standing to maintain action seeking declaration that federal district judge had forfeited his office and order requiring judge to return compensation received from the Federal

Sec. 4; 1 Art. 3, Sec. 1; 28 U.S.C.A. Sec. 372(c)(6)(B).

5. FEDERAL COURTS - 3.

Proceedings on complaint against federal judge are the concern of the judicial council and cannot be initiated in either district court or Court of Appeals, and thus, in action seeking declaration that federal district judge had forfeited his office and order requiring him to return compensation received, district court properly refused to forward complaint to chief judge of circuit so that judicial council could convene and, through extraordinary writs of quo warranto and prohibition, provide the relief requested. 28 U.S.C.A. Sec. 372(c); U.S.Ct.of App.11th Cir.Addendum 3, 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Georgia.

Before RONEY, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

In this case, the district court dismissed an action brought by Joseph Bergen, a member of the bar of the Southern District of Georgia, against the Honorable B. Avant Edenfield, a federal judge in that district. The complaint focused on Judge Edenfield's decision in 1981 to cease performing any judicial duties pending the completion of a grand jury investigation in which his name and the name of his former law firm reportedly had surfaced, and his subsequent decision in June 1982 after the grand jury failed

to indict him to resume sitting as a judge.

Plaintiff Bergen sought a declaration that Judge Edenfield had forfeited his office, an order requiring Judge Edenfield to return all compensation received from the federal government since December 8, 1981, "when he vacated his office," and an injunction prohibiting Judge Edenfield from performing any further judicial functions and from receiving any additional pay. Terming the complaint "frivolous and malicious," the district court sua sponte dismissed the action. Concluding that Bergen lacks standing and that neighbor the Constitution nor any congressional enactment provides for the relief sought by plaintiff, we affirm.

In asserting that he has standing to bring this action, Bergen cites his status as both a taxpayer and a member of the bar of the court on which Judge Edenfield

sits. Neither basis is sufficient to furnish standing in this case.

[1,2] To obtain standing as a taxpayer, a plaintiff must complain about an action taken by Congress pursuant to its taxing and spending authority and must demonstrate a specific constitutional limitation upon that authority which Congress has exceeded. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 477, 102 S. Ct.752, 761, 70 L. Ed.2d. 700, 713-14 (1982); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 227-28, 94 S. Ct. 2925, 2935-2936, 41 L. Ed. 2d. 706 (1974); United States v. Richardson, 418 U.S.166, 172-73, 94 S. Ct. 2940, 2944-2945, 41 L.Ed. 2d.678 (1974); Flast v. Cohen, 392 U.S. 93, 102-03, 88 S. Ct.1942, 1953-1954, 20 L. Ed. 2d. 947 (1968). Bergen has not

satisfied either requirement. He is challenging the conduct of a judge, not an enactment by Congress under its spending and taxing authority. While he asserts that Judge Edenfield is not entitled to compensation, he does not claim that the congressional appropriation of funds to pay the salaries of federal judges is somehow unconstitutional in this context, but rather that Judge Edenfield's actions deprive him of the right to receive compensation under an unchallenged enactment. See Valley Forge Christian College, 4534 U.S. at 478, 102 S.Ct. at 762, 70 L.Ed.2d at 714 (denying taxpayer standing where complaint centered on decision of agency within executive branch to transfer parcel of federal property, not on a congressional enactment); Schlesinger, 418 U.S.at 228, 94 S.Ct. at 2935-2936 (denying taxpayer standing where complaint centered on action of executive

branch in permitting members of Congress to remain in the Armed Forces Reserves). See also Public Citizen, Inc. v. Simon, 539 F.2d 211, 216-19 (D.C.Cir.1976) (denying taxpayer standing to challenge payment of federal salaries to White House aids while they allegedly were devoting virtually all their time to the reelection campaign, nor their official duties).

[3] With respect to Bergen's status as an attorney admitted to practice before the court on which Judge Edenfield sits, the Supreme Court has foreclosed standing on this basis. In Ex parte Levitt, 302 U.S.633, 58 S.Ct.1, 82 L.Ed.493 (1937), a member of the Supreme Court bar moved to prevent Justice Black from sitting on the Court, alleging that his appointment violated the ineligibility clause of the Constitution, U.S. Const. Art. I, Sec. 6, cl.2, and that no vacancy existed for

which a lawful appointment could be made. The Court denied the motion, reasoning that the attorney lacked standing because he had no greater interest in the appointment than any other citizen or member of the bar. Ex parte Levitt, 302 U.S. at 634, 58 S.Ct. at 1. Similarly, Bergen's complaint alleges no more than a common interest share by all in whether Judge Edenfield stays in office and retains the pay he has received. Although Judge Edenfield held Bergen in criminal contempt in a prior, unrelated proceeding, the outcome of this lawsuit could not affect the validity of the contempt citation since the order holding Bergen in contempt preceded the date on which Bergen claims Judge Edenfield "resigned," i.e., the date on which Judge Edenfield temporarily ceased performing his judicial functions. Asserting merely a generalized grievance, Bergen thus lacks the personal

stake necessary for standing. See Gladstone, Realtors v. Village of Bellwood, 441 U.S.91,99, 99 S.Ct.1601, 1607-1608, 60 L.Ed.2d 66 (1979); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S.59,72, 98 S.Ct.2620, 2630, 57 L.Ed.2d 595 (1978); Baker v. Carr, 369 U.S.186, 204, 82 S.Ct.691,703, 7 L.Ed.2d.663 (1962); Massachusetts v. Mellon, 262 U.S.447, 488, 43 S.Ct.597,601, 67 L.Ed.1078 (1923).

[4] Even if Bergen has standing to bring this suit, there is no law to apply. The only mechanism for removal of a federal judge provided in the Constitution is the impeachment process. U.S.Const. art. II, Sec. 4. The one provision in the Constitution relating to the pay of federal judges provides that compensation shall not be diminished while the judge

continues in office. Id. art.III, Sec. 1. Even if the Constitution authorized Congress to provide the relief sought by Bergen, Congress has never given a district court the power in a civil action to enjoin an Article III judge from continuing to sit on the bench, or to order him to return compensation previously paid. Cf.28 U.S.C.A. Sec. 372(c)(6)(B) (authorizing the judicial council of a United States Court of Appeals to impose various sanctions against a judge within the circuit, but expressly prohibiting the council from removing the judge). There is simply no legal basis for this suit.

The district court quite properly dismissed the complaint sua sponte. As stated in the brief of the United States as amicus curiae,

An independent federal judiciary is an essential element of the American

constitutional system. To safeguard the proper functioning of that system, the United States has a strong interest in ensuring that federal judges are not harassed by frivolous lawsuits which challenge their qualifications to continue as federal judges. A lawsuit seeking to remove a federal judge from his office and to require the judge to repay his salary at the behest of one individual is wholly without merit and contrary to established legal principles. If not terminated promptly such a suit would threaten the independence of federal judges.

[5] In the alternative, Bergen asked the district court to forward his complaint to the Chief Judge of this circuit so that the judicial council of the circuit could convene and, through the extraordinary writs of quo warranto and prohibition, provide essentially the same relief as requested of the district court.

Under 28 U.S.C.A. Sec. 372(c) and 11th Cir. Rules, Addendum 3, an individual may file a complaint against a judge with the clerk of this Court. The statute and circuit rule establish a detailed procedure for the handling of the complaint by the Chief Judge of the Court and the circuit's judicial council. The district court acted properly in re fusing "to act as [Bergen's] messenger in filing the complaint with the Clerk of the Eleventh Circuit Court of Appeals." Although proceeding pro se, the plaintiff is an attorney. The statute and Eleventh Circuit Rule for Conduct of Complaint Proceedings under 28 U.S.C.A. Sec. 372(c) are precise and clear. The proceedings are the concern of the judicial council, not the court, and are totally separate from any authorized lawsuit or court proceeding. Such proceedings can not be

initiated in either the district or the circuit court.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-8396

JOSEPH B. BERGEN,

Plaintiff-Appellant,

versus

B. AVANT EDENFIELD,

Defendant-Appellee.

Appeal from the
United States District Court
For the Southern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 28, 11 Cir., 1983, _____F.2d._____).
(June 23, 1983)

Before RONEY, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY
United States Circuit Judge

REHG-6
(Rev.6/82)

APPENDIX D

CONFIDENTIAL PRIVILEGED MATERIAL

STATE OF GEORGIA]
]
COUNTY OF CHATHAM]

AFFIDAVIT

Re: Judge B. Avant Edenfield

JOSEPH B. BERGEN, having been duly sworn by the undersigned Notary Public and while under oath, deposes and says as follows:

1. This Affidavit is being given by me to preserve and attest to a conversation that I had with Judge B. Avant Edenfield at the Savannah Yacht Club beginning shortly before 10:00 p.m., Friday night, January 8, 1982. I am dictating this affidavit in my law office on Saturday morning, January 9, 1982, with this dictation beginning at 11:45 a.m., following two conversations I had with one of my attorneys, Michael J. Egan, Jr., of Atlanta, with the first conversation

beginning at approximately 8:30 a.m., on this Saturday morning when I called Mr. Egan to advise him of the conversation I had with Judge Edenfield last night, and the second conversation I had with Mr. Egan after Mr. Egan called me back at approximately 11:30 this morning. I had previously called one of my other attorneys, Kirk M. McAlpin of Atlanta, last night at approximately 11:30 as soon as I arrived at my home after leaving the Yacht Club. Mr. Egan informed me that he had conferred with Mr. McAlpin following our first telephone conversation this morning and during both of my conversations with Mr. Egan he advised me to dictate my recollections of this conversation and the circumstances surrounding the conversation with Judge Edenfield so as to put a memorandum in my file regarding this occurrence while the conversation was still fresh in my mind.

2. My wife and I went to the Yacht Club last night, arriving at approximately 7:30 p.m., and I had several beers during the period from approximately 7:30 p.m., until approximately 10:00 p.m., during which time my wife and I talked with various friends in the bar. The people with whom we talked were Dr. Ray McCullough, a dentist, and his date, Erica Overacker, a client of mine; Alec Barbee, the Commodore; Jack O'Donovan, Vice President of Savannah Bank & Trust Company, and his wife; Jimmy Hiott and his wife; Sam Strang and his wife; Walter Corish, Vice President of Corish Insurance Company; Tom Gray, a lawyer, and his wife; Frank Puder and his wife, Dr. Lane Reeves; Charles Spillane, a Public Accountant; Dr. Dickey Timms; Kinney Williams, an IBM representative; and others. Also, the two regular bar tenders at the Club, Tommy, the head bartender, and Eddie, were

tending bar and served the drinks I purchased as reflected on my charge ticket.

3. The Yacht Club tickets mentioned will confirm that I had a total of five Schlitz beers in 12 oz. cans during the time I was at the Yacht Club and my wife had five Vodkas and tonic. I had three Schlitz beers before the conversation I had with Judge Edenfield, one at the Yacht Club after the conversation and one can of Schlitz before I left at approximately 11:15 p.m.

4. Shortly before 10:00 p.m., Judge Edenfield, his wife and Robert Franklin, an automobile dealer from Statesboro, and his wife, came into the bar and sat at a table on the far side of the room. At 10:00 p.m., the last call for taking dinner orders was announced over the public address system, at which time most of the people remaining in the bar

proceeded toward the Dining Room, including Judge Edenfield and his party. My wife went to the Ladies' Room at this same time and I remained standing in the middle section of the bar drinking my third beer to await the return of my wife. At this time Judge Edenfield stopped, turned toward me and then came over to me at the bar, at which time the following conversation occurred:

Judge Edenfield talked first, telling me he knew from the way that I looked at him during that evening and on earlier occasions, as well as from my expressions, that I was talking about him in an uncomplimentary fashion. I told the Judge, in effect. that he was very perceptive and I also told him that he certainly would not expect me to say anything nice about him after what he had done to me. The Judge told me that he understood and that he had been worrying

every day about the order he entered finding me in contempt last June. I told him that it had been worrying me, too. He told me that I did not need to worry about going to jail as he was not going to let that happen. I told him that I was not worried about going to jail as that was the least of my concerns. I told him what worried me was what he had said about me in that order when he knew very well that what he said was not so. I told him that we had been friends for many years and he knew that I had no intention of violating this order. The Judge said: "I know that, and I want to do something about it." He said "I was so mad with you that I could have chewed nails." I then told the Judge that he had already decided that I was in contempt and had a draft of the order prepared sitting up on the bench before he heard the evidence in the case, and the Judge said: "Yes, that is right."

He said: "But I could enter another order changing that." I asked him how could he enter an order when he had stepped down from the bench during the drug probe in which his name was mentioned and he was not entering orders. He said that didn't make any difference, that he could sign an order. I also asked him: "Well, then, how can you sign an order in my case when the case has been sent over to Judge Elliott for handling," because of his having been disqualified as a result of my Affidavit of Prejudice. He said that still didn't make any difference, he could still sign an order, at which point he told me that he didn't like what I had to say about him in the affidavit, to which I replied, "Well, everything I said was true, wasn't it?" and he said "Yes," but he still didn't like it, and then we did not discuss the affidavit any further. The Judge then told me while pointing his

finger at me that he was a federal judge and that I could not fight him and win. I told him well, I didn't want to fight him but I felt the judgment would be set aside by Judge Elliott. He said, well, that may not be necessary as he wanted me to come to his office next week and we could discuss what could be done. I told him that I understood he had not been going down to the office and would he be there, and he said yes, he had been going down to the office every day and that he would be there.

5. About this time in the conversation, my wife returned from the Ladies' Room and when she saw Judge Edenfield and me talking she became upset with the Judge and asked him why he was speaking to her husband. When the Judge started to respond, she told him that she hoped he and his wife were worrying about his problem as much as she and her family had

worried since he did what he did to me. I then asked my wife not to interfere and to let us talk, but my wife said no, she wanted to stay and hear what he had to say. At this point I suggested to the Judge that we retire to the Men's Room so we could continue our conversation. The Judge agreed and the two of us went to the Men's Room and we talked briefly along the same lines, but people kept coming in and out of the Men's Room that interrupted our conversation, so the Judge suggested that we walk outside and we then went outside and walked down on the front dock. As we reached the midsection of the span approaching the front docks the Judge and I stopped and continued our conversation, at which time the Judge told me that if he made a mistake he was man enough to admit it and to correct it. I told him that I appreciated that and hoped he would do just that. The Judge also told me that he

was man enough to take me on and whip me any way I wanted, that he could handle me, and that he didn't need the United States Marshals to protect him. I asked him why he was talking like that because I had no intention of getting into any altercation with him, and he said well, he could still whip me and that he would lick me in the courts, too, as there was no way I could win against him. I told him that I recognized that he was a man but his problem was that he didn't recognize that I was a man, too, and that I deserved the same respect that he expected from me and the other lawyers and that he certainly didn't treat me right when he found me in contempt and said what he said about me. I told him that as a matter of fact he had systematically alienated everybody who had any contact with him or had anything to do with his court; that the court officials disliked him, but they wouldn't

say anything to him about it because they had their jobs at stake and the livelihood of their families; that he had alienated every single lawyer who had appeared before him; every juror; every litigant; every witness; and even the spectators in his court room. I told him that he was arbitrary, rude and discourteous. In fact, I pointed out that when he would come on the bench he wouldn't even so much as exchange a pleasantry with the lawyers and other parties in the court room by even saying good morning or good afternoon, and that when he finished hearing what he wanted to hear, without saying anything he would just get up and abruptly leave. He said, well, he didn't realize that he was being that way; that all he was trying to do was to be perfect. I told him that he was not perfect, that he was only a man and was mortal just like the rest of us and that he would never be

perfect. I told him he should make allowances for that and make allowances for the imperfections of other people. He listened to what I had to say with good grace and told me that he would try to change, and I told him that was fine and that I hoped we could be friends once again provided he righted the wrong that he had done me. The Judge then said well, call me next week. He said that he would do this, but he admonished me not to tell anyone that we had had this conversation. I told him I would not talk about it to anyone, although I later decided that I had to confide with my lawyers, Mr. McAlpin and Mr. Egan, to seek their advice concerning this turn of events. I decided not to reveal this occurrence to my present attorney of record, Mr. Robert Fierer of Atlanta, who is handling post trial motions, until after I met again

with Judge Edenfield in his office and found out just what he was going to do.

6. At this point my wife came out of the Club and walked down to us on the dock span and wanted to know why I was talking to Judge Edenfield, and the Judge and I both told her not to worry, everything was all right. She then again told the Judge that the damage had already been done, that there was no way that he would undo the hurt that he had caused her and her family. I told my wife, well, he is going to do what he can to undo it, so just go on back in the Club. My wife said no, she wanted to stay there, at which time I said: "Avant, lets you and I go on back to the Club," and we walked back to the Club together with my wife following. When we reached the Club I went into the bar and ordered another beer, my fourth beer, and stood there drinking the beer while waiting on my wife to come back in as I

assumed that she had stopped by the Ladies' Room again. Judge Edenfield had rejoined his group in the Dining Room.

7. After a few minutes wait and my wife did not come in, I thought perhaps she had gone on into the Dining Room, and I went to the entrance of the Dining Room to see if she was there and when Judge Edenfield saw me, he got up from the table, came back over to me again and asked me to come over to the table to say hello to his wife and to meet his guests. I spoke to the Judge's wife and the Judge introduced me to Bobby Franklin and his wife. I commented that I already had met Bobby and his wife but it was nice to see them again, and I mentioned that Bobby's brother, Lehman, who is also a lawyer practicing in Statesboro, and I were good friends. After exchanging a few more pleasantries, I told the Judge and his

party good-night and went back to the bar and finished my beer.

8. About this time, my wife returned to the bar saying that she had been sitting in the car waiting for me because she was so upset. She ordered another drink and I ordered another beer, and shortly thereafter we left the Club and went home.

9. Upon my arrival home, I immediately called Kirk McAlpin at his home in Atlanta and related to him what had occurred at the Yacht Club. Mr. McAlpin advised me not to discuss the matter with anyone, as the Judge had requested during our conversation on the dock, and to call the Judge MOnday and make the appointment to see him as the Judge had asked and then let him know what the Judge had to say.

10. It is now 12:55 p.m., on Saturday, January 9, 1982, and on Monday

Morning, January 11, 1982, I intend to telephone Judge Edenfield's secretary, Evelyn O'Neal, and ask her to find out from the Judge when he wants to see me at his office. Following this anticipated meeting, or even if the meeting does not occur, I intend to prepare a Supplemental Affidavit to reflect the future developments in this matter.

11. Following the dictation of the above portion of this Affidavit I saw Paul Painter, who represents Douglas Jacobs in the contempt action, at approximately 2:20 p.m., at the Savannah Golf Club where I had joined my wife to have lunch. I felt that since he represented Douglas Jacobs I should tell him in confidence about the conversation I had with Judge Edenfield. I told him about what occurred and, in turn, admonished him not to discuss it with anyone whomsoever and that I would

let him know what developed after I met with Judge Edenfield.

/s/ Joseph B. Bergen
Joseph B. Bergen

Sworn to and subscribed before me

This 11th day of January, 1982

/s/ Ellen F. Upchurch
Ellen F. Upchurch
Notary Public, Georgia

My commission expires: 10/13/85
[Notarial Seal]

CONFIDENTIAL PRIVILEGED MATERIAL

STATE OF GEORGIA]
]
COUNTY OF CHATHAM]

SUPPLEMENTAL AFFIDAVIT

Re: Judge B. Avant Edenfield

JOSEPH B. BERGEN, after being duly sworn, deposes and says while under oath, as follows:

1. This additional Affidavit is being dictated beginning at 10:20 a.m., on Monday, January 11, 1982, to supplement the first Affidavit dictated on Saturday, January 9, 1982, regarding my contact with Judge B. Avant Edenfield concerning the contempt order issued against me by Judge Edenfield.

2. As requested by Judge Edenfield, I telephoned his office at approximately 9:15 a.m., on this date and the Court Room Deputy, Mr. Ed Silas, answered the phone. I told Mr. Silas that the Judge had requested me to call him today and to

please ask the Judge when he wanted to see me and I would be available. Mrs. Evelyn O'Neal, the Judge's secretary, called me back at 9:30 a.m., and left a message with my secretary, Mrs. Ellen F. Upchurch, for me to be in the Judge's office today at 10:00 a.m. I arrived at the Judge's office at approximately 9:50 a.m., and the Judge invited me in and we conferred until approximately 10:10 a.m.

3. When I went into the Judge's office I told the Judge that I appreciated his agreeing to see me, at which point the Judge told me that he was going to do what he told me he was going to do when we talked Friday night at the Yacht Club but that he was not going to go so far as to apologize. He said he wanted to dismiss the contempt and also withdraw his findings that I fraudulently misled and deceived Superior Court Judge E. H. Gadsden. He said he would do it on the

basis that he had reconsidered the matter and concluded that his first order was in error.

4. During our conversation, the Judge told me that the reason he was doing this was because he had been thinking about what he had done constantly since the order was entered and that he was doing it for two people, me and his cousin, Judge Newell Edenfield, who died just before the New Year. He told me that Judge Edenfield, who was a close friend of mine, told him that he wanted him and me to sit down and have a drink together, which Judge Edenfield said he interpreted as meaning Judge Newell Edenfield wanted him and me to become friends once again and the only way that could be done was for him to correct what had been done.

5. Judge Edenfield told me that when he got back from Europe after I had filed my Affidavit of Predudice he was very

upset over the Affidavit of Prejudice that I filed and he first said he wanted me to do something about that but then said no that was all right I did not have to withdraw what was said.

6. The Judge then told me he wanted me to talk with Kirk McAlpin and my other Atlanta lawyer [Robert Fierer] if I wanted to and try to come up with some way we could work out the mechanics of getting the case back to him so we could enter an order which he would do even though he is, as he said, more or less in limbo. I told Judge Edenfield that I already had been thinking of some way that this could be done since our conversation Friday night and that I thought perhaps I could write a letter to Judge Elliott or perhaps file a Motion withdrawing my Affidavit - which would satisfy his initial feeling that I should take back what I said, as far as the record goes - and request Judge

Elliott to return the case to Judge Edentield for dismissal of the contempt action with the order containing a withdrawal of the findings made in the contempt order regarding my fraudulent misrepresentations and deception.

7. I told the Judge I would talk with Kirk about how this could be done and then get back to him as he asked me to do. Judge Edenfield commented again on the power he had as a federal judge. I agreed and observed that this power was an awesome power.

8. We then had a short discussion about Herman Diamond who, the paper said, had died yesterday. The Judge commented about how dreadful it was for the paper to quote from his decision in Hy's obituary in which he stated "This Diamond will not last forever." He lamented over the lack of taste of the newspaper, saying that he just thought it was awful that they did

this to his family. I, of course, agreed, and after a brief restatement of my intention to call Kirk, I told the Judge that I would get back in touch with him. We shook hands and I departed.

/s/ Joseph B. Bergen
Joseph B. Bergen

Sworn to and subscribed before me

This 11th day of January, 1982.

/s/ Ellen F. Upchurch
Ellen F. Upchurch
Notary Public, Georgia

My commission expires: 10/13/85
[Notarial Seal]

APPENDIX E

U. S. Constitution Article II, Sec.4:

Section 4. Removal from office.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U. S. Constitution Article III, Sec.1:

Section 1. Supreme Court and inferior courts--Judges and compensation.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Title 28 USC Sec. 372(c)(6)(B):

(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council --

(b) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit,

including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title [28 USCS Sec. 371] shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be

assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title [28 USCS Sec. 631] and any removal of a bankruptcy judge shall be in accordance with section 153 of this title [28 USCS Sec. 153];"

Title 28 USC Sec. 134(a):

Section 134. Tenure and residence of district judges.

(a) The district judges shall hold office during good behavior.

Title 28 USC Sec. 144:

Section 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such

time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Title 28 USC Sec. 455:

Section 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy.

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in

controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to

either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1). "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2). the degree of relationship is calculated according to the civil law system;

(3). "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4). "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge

participates in the management of the fund;

(ii) An office is an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from

the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

PROOF OF FILING AND SERVICE

I, the undersigned, JOSEPH B. BERGEN, pro se attorney of record for the appellant and a member of the Bar of the Supreme Court of the United States, depose and say that on the 30th day of June, 1983, I filed forty (40) copies of the foregoing Petition for Certiorari in the Supreme Court of the United States with The Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, and I served three (3) copies of the foregoing Petition for Certiorari on The Honorable Rex E. Lee, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; The Honorable Hinton R. Pierce, United States Attorney for the Southern District of Georgia, Federal Building, Savannah, Georgia 31401; Edward S. Szukelewicz, Esquire, Attorney for Respondent, Suite 416, Washington

Bldg. Washington, D. C. 20005; and Frederick Geilfuss, Esquire, Attorney, Appellate Staff, Civil Division, Room 3617, Department of Justice, Washington, D. C. 20530, who are all the parties required to be served, by placing said copies of said petition in an authorized depository for mail at the United States Post Office at Savannah, Georgia, in a properly addressed envelope with sufficient postage thereon to ensure First Class Certified Mail delivery within the time allowed for such filing.

Joseph B. Berger, Pro Se

Sworn to and subscribed before me
This 30th day of June, 1983.

Ellen F. Upchurch
Notary Public, Georgia

[Notarial Seal]
My commission expires: October 13, 1983.

ENTRY OF APPEARANCE
THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1983

JOSEPH B. BERGEN,

Petitioner,

VS.

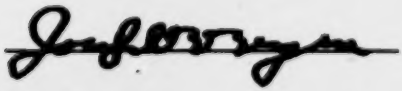
B. AVANT EDENFIELD,

Respondent.

The Clerk will please enter my appearance as Pro Se Counsel for Joseph B. Bergen, who in this court is petitioner.

I certify that I am a member of the Bar of the Supreme Court of the United States.

JOSEPH B. BERGEN, PRO SE



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